

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ELECTION PETITION No 3 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

RAJWADI (CHAUDHARI) RAJANIKANTPARABHUBHAI

Versus

RATHOD PRAVINBHAI CHHAGANBHAI

Appearance:

MR YN OZA for Petitioner

MR SV RAJU for Respondent No. 1

SERVED for Respondent No. 2

MR VH DESAI for Respondent No. 10

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 09/01/97

ORAL JUDGEMENT

1. The petitioner herein, being one of the candidates who contested election of Gujarat State Legislative Assembly from 166 - Bardoli (ST) Assembly Constituency, has brought under challenge the said election and the notification declaring the respondent

No.1 Mr. Rathod Pravinbhai Chhaganbhai sponsored by Indian National Congress as having been elected from the aforesaid constituency, under the provision of Section 80(A) of the Representation of Peoples Act, 1951 ("the Act" for short).

2. The petitioner has based his challenge on following brief facts as contained in the petition :

The petitioner, 45 years of age, possessing qualification of Inter-B.Sc. is a scheduled tribe candidate and a full time social worker. He filed his nomination as an official candidate of Bhartiya Janata Party ("BJP" for short) for the Gujarat State Legislative Assembly Election of February, 1995, on 9th January 1995 from the Gujarat State Legislative Assembly Constituency in question. The petitioner is a registered voter of the said constituency as per the particulars set out in the petition. There were in all 11 candidates including the petitioner and respondent No.1 being the candidate of Indian National Congress ("Congress" for short). The copy of ballot paper indicates some shaded/dotted area just near in front of the petitioner's name and symbol. It was noticed during the course of counting that vote cast in such shaded area came to be rejected as having been cast in favour of the petitioner, upon a complaint having been made in that respect from the side of the petitioner. Ultimately the counting was over and thereafter the petitioner gave a complaint in that respect seeking recounting. The petitioner, inter alia, prayed for considering 'X' mark placed in such shaded area to be treated as vote cast in favour of the petitioner. The petitioner's request was not accepted by the Returning Officer who said that such votes would be considered as invalid votes. Ultimately they were declared as invalid. The petitioner, however, made an application for recounting on 12th March 1995. Even upon recounting the Returning Officer declared respondent No.1 as having been duly elected as member of Legislative Assembly from the aforesaid constituency in the election in that respect held on 25th February 1995 as per the Notification Annexure : E.

3. The petitioner has, therefore, challenged the aforesaid election and the declaration thereof in favour of the first respondent on the ground that the votes which were cast in the shaded area opposite the petitioner's name in the ballot papers should be counted in favour of the petitioner. According to the facts set out by the petitioner such votes were approximately about 2500 which if counted in favour of the petitioner, the

petitioner would stand elected from the aforesaid constituency keeping in mind the margin of votes gained by the petitioner and the respondent No.1. It is the petitioner's say that the petitioner was defeated by a small margin of 357 votes by the respondent No.1 being his nearest rival.

4. It is the case of the petitioner that at no point of time he has been informed or intimated from the office of the Election Commission or the concerned officer for seeing the ballot paper and seeing the printing style of the ballot papers before the election. According to his case when the voters came to know of the fact that the ballot papers wherein 'X' marks was made just opposite near and in front of the name of the petitioner in the shaded area, are considered as invalid votes they rushed to the petitioner informing him that they intended to vote for him by casting such votes in the shaded area in front of the name of the petitioner. It is the case of the petitioner that there is nothing on the ballot paper so as to indicate that the vote should not be cast by placing 'X' mark in the shaded area. In absence of such indication on the ballot papers wherein the voters have put 'X' marks just opposite near and in front of the petitioner's name in the shaded area, the votes should be considered as votes cast in favour of the petitioner because the 11th candidate i.e. Halpati Maganbhai Chhanabhai whose placement in the ballot paper is in such a position that he could not have been considered as having obtained any such votes, had secured only 167 votes in the said election. It is, therefore, the case of the petitioner that such votes, in the alternative, would directly go in favour of the petitioner.

5. The petitioner has further averred that if such ballot papers in which voters put 'X' marks just opposite, near and in front of the name of the petitioner in the shaded area are examined, it would be clear that the intention of such voters was to give votes only in favour of the petitioner. The shaded area, which is believed by the Returning Officer, is not the very shaded area, which is shown in the blank portion at the place of 12th candidate, meaning thereby, the shaded area, which is stated in the rules, is applicable only to the area of dividing line between two candidates. In other words, such shaded area would be only just as shown in between the names of two candidates but the last blank portion which is shaded, cannot be said as shaded area and, therefore, the entire basis of counting adopted by the election authorities is false and contrary to the belief of a normal and or average person.

6. It is in the aforesaid fashion that the petitioner has brought under challenge the election in question and the result thereof.

7. Only the first respondent has filed his written statement and the same appears at Ex.9. While denying the allegations contained in the petition this respondent has asserted that the shaded area referred to cannot be said to be near and in front of the petitioner's name and symbol, but it is actually near and in front of the name of Halpati Maganbhai Chhanabhai having symbol "Kite". If the vote is cast by placing 'X' marks in this area one cannot say as to which person the voter has voted. He has, therefore, asserted that the vote declared to be invalid by the Returning Officer is rightly so declared. According to the say of this respondent the petitioner had agreed about recounting being proper and correct and the petitioner could not have made any grievance against the mod and manner of counting and recounting. The petitioner is, therefore, estopped from raising any such contention. The petition is, therefore, stated to be barred by principle of estoppel.

8. Having heard the learned Advocates for the parties and having considered the aforesaid pleading of the respective respondent, following Issues were framed at Ex.12. The same would read as under :

- (1) Whether the petitioner proves that the Returning Officer was in error in rejecting the votes cast in favour of the petitioner by putting 'X' marks in the shaded area against the ballot paper ? If yes, what is its effect ?
- (2) Whether the petitioner proves that the respondent No.1 was wrongly declared elected and that his election to 166-Bardoli Constituency is liable to be quashed and set aside ?
- (3) What order ?

9. My findings on the aforesaid issues are :

- (1) In the negative.
- (2) In the negative.
- (3) As per order below.

10. Apart from the facts set out in the petition the parties have adduced evidence in the form of petitioner's oral testimony appearing at Ex.18 and respondent No.1's

oral testimony appearing at Ex.23.

11. The sample ballot paper produced at Annexure : A has been taken in evidence at Ex. 14 by consent of the parties. The petitioner's complaint referred to in the petition has been placed on record at Ex.19. The statement of declaration of result has been received in evidence at Ex.15. Finally the report for seeking permission of the Commissioner for declaration of the result is placed at Ex.22.

12. Before the evidence is taken up for consideration it might be noted that the votes as per the declaration of the result secured by the respective candidates having not been in dispute, the particulars thereof might be stated.

NAME OF CANDIDATES NO.OF VOTES SECURED

| | |
|--------------------------------------|-------|
| 1. Gamit Ukkadbhai Ratanjibhai | 3463 |
| 2. Chaudhari Kesarbhai Chhagdabhai | 362 |
| 3. Chaudhari Jashvantbhai Nadiabhai | 1548 |
| 4. Chaudhari Devsingbhai Narsingbhai | 1901 |
| 5. Chaudhari Balubhai Keshavbhai | 2297 |
| 6. Rajwadi Rajnikant Parbhubhai | 43331 |
| 7. Rathod Pravinbhai Chhaganbhai | 43688 |
| 8. Vasava Ishvarbhai Bhanabhai | 9424 |
| 9. Sureshbhai Motiabhai Chaudhari | 558 |
| 10. Halpati Thakorbhai Budhiabhai | 247 |
| 11. Halpati Maganbhai Chhanabhai | 167 |

106,986

13. It may be seen from the report that there were 6206 votes shown as rejected and 5 votes shown as missing votes with a grand total of 1,13,196 votes. Para : 5 of the Report has been read before me and, therefore, the same needs be reproduced :

"BJP Candidate requested to consider the voting mark on the shaded area of the ballot paper as a valid vote for him, as his name is against that column. He requested to represent this matter to ECI, New Delhi to make change pertaining to this kind of space allotted on the ballot paper it has no legal ground. I convinced him."

The last Para of the report reads as under :

"He was satisfied with the re-counting and it was completed at about 13.50. The counting was

completed peacefully. So I recommend to give approval for declaring the final result of 166 Bardoli L.A. (S.T.) Gujarat."

14. Over and above the aforesaid report, reliance has also been placed upon Rule : 56(2)(clause :b) and clause (d) of the Conduct of Election Rules, 1961, which would read as under :

"56. Counting of Votes : (1) xxxxxxxxxxxxxx

(2) The returning officer shall reject a ballot paper;

(a) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(b) If it bears no mark at all or, to indicate the vote, it bears a mark elsewhere than on or near the symbol of one of the candidates on the face of the ballot paper or, it bears a mark made otherwise than with the instrument supplied for the purpose, or

(c)

(d) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given, or

(e) to (h) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Sub-Rule : 3 of Rule 56 indicates the manner of rejection of the ballot papers by the Returning Officer. Finally the reference has also been made to Booklet published by the Election Commission, inter alia, setting out the chart of the illustrations of invalid cases and xerox copy of Page : 19 thereof being invalid case No. IV has been illustrated. In that case 'X' mark has been shown in the shaded area below one candidate and above the other candidate.

15. Reference may now be made to what the petitioner has stated in his oral testimony. The relevant version of the petitioner as contained in Para : 2 would read as under :

"That complaint was taken on record at about 8.00

a.m. Such votes were in all 2500 (approximately) and out of them there were 43 votes which were cast in the space below my name. 457 votes were cast in the dotted area exactly opposite my name. Rest of the 2000 votes (approximately) were cast in the shaded area below the name of Halpati Maganbhai Chhanabhai."

In his cross examination the witness has admitted that in complaint lodged by him before the Assistant Election Officer he did not specifically mention about the separate classification of invalid votes as deposed to by him (as per reproduction hereinabove). The petitioner admitted in his cross examination that he gave complaint as per Ex.19. He denied the suggestion that such 457 votes were not exactly cast in front of his name in the dotted area, but were cast exactly below the name of Halpati Maganbhai Chhanabhai in the dotted area. The respondent No.1's oral evidence consists of denial of the petitioner's case.

16. It might be noticed that the facts with regard to the result of the election and the number of votes having been declared as invalid are not in dispute. It might also be noted that the report of the Returning Officer as having been quoted hereinabove is also not in dispute. What has been contended on behalf of respondent No.1 is that the petitioner has taken a somersault in his evidence which is quite contrary to his pleading. This is, submits Mr.Raju, what is precisely impermissible. According to his submission, apart from the fact that the petitioner's evidence cannot be accepted as falling much sort of proof, the petitioner cannot be permitted to set out the facts different from the facts pleaded in the petition. Mr.Raju placed reliance upon a decision in the case of Mohammad Yusuf V/s. Bhairon Singh Shekhawat, reported in A.I.R. 1995 Rajasthan 239 . Reference has been made to Para : 16 of the citation which in turn refers to the observations of the Apex Court in the case of Samant N. Balakrishna V/s. George Fernandez, reported in AIR 1969 SC 1201. The said observations of the Apex court appearing in Para : 16 of the Rajasthan decision might here also be reproduced :

"Section 83 provides that the election petition must contain a concise statement of the material facts on which the petitioner relies and further that he must also set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of

the commission of each such practice. The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. Thus the material facts will mention that a statement of facts (which must be set out) was made and it must be alleged that it refers to the character and conduct of the candidate that it is false or which the returned candidate believes to be false or does not believe to be true and that it is calculated to prejudice the chances of the petitioner....The material facts thus will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action. In stating the material facts it will not do merely to quote the words of the section because then the efficacy of the words 'material facts' will be lost. The fact which constitutes the corrupt practice must be stated and the fact must be correlated to one of the heads of corrupt practice. Just as a plaint without disclosing a proper cause of action cannot be said to be a good plaint, so also an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections can not be said to disclose a cause of action where the allegation is the making of a false statement.... It is inconceivable that a petition could be filed without the material facts and the schedule by merely citing the corrupt practice from the statute. Indeed the penalty of dismissal summarily was enjoined for petitions which did not comply with the requirement. Today the particulars need not be separately included in a schedule but the distinction remains. The entire and complete

cause of action must be in the petition in the shape of material facts, the particulars being the further information to complete the picture."

17. Mr.Raju, learned Advocate also placed reliance upon a decision of this Court in Election Petition No. 7 of 1995 between Kanodia Nareshkumar Mithalal V/s. Parmar Dr.Dineshbhai Rudhabhai, decided on 27th August 1996 (Coram : N.J.Pandya, J.). In that case also the question which was presented before the Court was whether the petition should fail for want of setting out the material particulars of corrupt practice. This Court had an occasion to refer to a decision of the Honourable Supreme Court in the case of U.S.Sasidharan V/s. K. Karunakaran & Anr. reported in AIR 1990 SC 924, wherein it has been held that the petition must set forth material facts constituting corrupt practice. This Court had an occasion to refer to the averments contained in the petition before the Court and finding that it was lacking material particulars, this Court dismissed the petition with costs.

18. Mr.Raju also made reference to the another decision of this Court in Election Petition No.2 of 1995 between Madhubhai Hamirbhai Bhabaria V/s. Ms.Shantaben K. Chavda (Coram : N.J.Pandya) decided on 27th August 1996. In that case also reference has been made to the aforesaid decision of the Apex Court.

19. Mr.Gautam Joshi, learned Advocate appearing for Mr.Y.N.Oza, learned Advocate for the petitioner sought to distinguish the aforesaid decisions on the ground that the petitioner had come out with a case that whatever votes which were cast in shaded area must be counted in favour of the petitioner and what the petitioner sought to do in his oral evidence is to elaborate as to exact fact with regard to votes which were actually cast just nearby the petitioner's name in the shaded area just opposite the petitioner's name. It maybe noted that the petitioner was knowing and must be taken to have the knowledge about how many were the votes which were cast in the shaded area just near the petitioner's name or the symbol which would clearly indicate the intention of the voter without there being any doubt about the vote having been cast to Halpati Maganbhai Chhanabhai. This is so because the shaded area is just below the name and symbol of Halpati Maganbhai Chhanabhai and the same shaded area is opposite the name and symbol of the petitioner. In fact the statement of facts with regard to how many were the actual votes which would indicate the intention of

the voter in favour of the petitioner would be a relevant material fact which ought to have found place in the petition itself. The result is that the submission of Mr. Raju which gets support from the aforesaid decisions has to be accepted. Even otherwise upon appreciation of evidence the petitioner's stand cannot be accepted. It is only a word against word which would indicate the fact that there was a difference of actually 457 votes which would have without doubt gone in favour of the petitioner. For the purpose of ascertaining the intention of the voters there must be clear pleading in that regard in the facts of the present case. The petitioner had raised the objection with regard to the votes cast in the shaded area of the ballot papers and that objection was decided even on recounting, by treating 6206 votes as invalid votes. Such invalid votes might be the votes appearing to have been cast in the shaded area. The petitioner having felt satisfied about his fate on recounting could hardly have voiced any grievance in this petition in any manner as indicated hereinabove. The petitioner cannot be permitted to succeed on the nature of facts pleaded in the petition and the nature of facts set out in the evidence. The result in either case would be the same.

20. In view of the fact that the petition would fail on the ground that the petitioner has not set out material facts as have been set out in the evidence and in the alternative the petitioner's evidence being contrary to what actually transpired before the Returning Officer it would not be necessary to take to the alternative submissions made on the rejection of votes as invalid votes cast in shaded area and not the area meant for casting the votes. In fact the Rule which has been quoted hereinabove lends support to the decision of the Returning Officer.

21. The question that now remains is with regard to awarding of cost.

I have heard both the learned Advocates on the question of costs. In the peculiar facts and circumstances of the present case it would be just and proper if the parties are directed to bear their own costs.

22. The petition is, therefore, dismissed with no order as to costs.

Copy of this Judgment be sent to the Election Commission, New Delhi.

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